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No. 454

In the Supreme Court of the United States

OCTOBER TERM, 1958

SALVATORE TERRITO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

ROBERT W. GIBBANS,
General Counsel,
JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the final judgment entered by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing an action brought by appellants to set aside Interstate Commission orders instituting two separate investigation proceedings for the purpose of determining, after hearing, the proper status of the appellants under Part II of the Interstate Commerce Act as either

motor carriers for hire or private carriers of property by motor vehicles.

By orders dated October 3, 1956 (copies attached as Appendices A and B, *infra,* pp. 6–9), Division 1 of the Commission, on its own initiative, instituted two investigation proceedings under Section 204 (c) of the Interstate Commerce Act, 49 U. S. C. 304 (c), for the purpose of determining whether appellants' motor carriers operations were, on the one hand, those of common or contract carriers of property by motor vehicle or, on the other, those of private carriers. If the operations are those of a private carrier, appellants are subject to the Interstate Commerce Act only with respect to safety of operations, maximum hours of service of employees, and standards of equipment. If the operations are those of a common or contract motor carrier, they are subject to various other requirements of the Act.

If the Commission finds, as a result of the investigation proceedings, that appellants' operations are being performed as common or contract carriers of property, the Commission may issue orders requiring them to cease and desist from such operations until such time as appellants obtain from the Commission appropriate certificates or permits as required by Sections 206 (a) (1), 209 (a) (1), and 203 (c) of the Act, 49 U. S. C. 306 (a) (1), 309 (a) (1), and 303 (c). Any order so issued would, of course, be subject to review in the courts. But if the Commission finds that appellants are private carriers of property by motor vehicle, as defined in Section 203 (a) (17) of the Act,

49 U. S. C. 303 (a) (17), the Commission would discontinue the investigation proceedings.

The three-judge district court unanimously held that the orders instituting the investigation proceedings are not reviewable and dismissed the complaint.

ARGUMENT

Appellants assert that they are private carriers under the Interstate Commerce Act and not common or contract carriers; that the Commission's jurisdiction over private carriers extends only to matters pertaining to safety of operation, hours of service of employees, and standards of equipment; and that, since the Commission's investigation of appellants did not relate to such matters, it was not authorized by the statute. But the Commission has done nothing more than to decide that there is sufficient cause for an investigation and determination of the question whether appellants' operations bring them within the statutory definition of a private carrier or within the statutory definition of a contract or common carrier. For this purpose, it issued the two orders as notices to appellants that a hearing would be scheduled at which the Commission's Bureau of Inquiry would offer evidence on the issue.

Although these notices are styled "orders," they do not require appellants to do or refrain from doing anything. Insofar as appellants are concerned, they are merely given notice of the proceedings so that they may, if they desire, participate therein, cross-examine witnesses, offer evidence, and be heard generally on the issues. If the Commission's decision

should be adverse to appellants or either of them, its order or orders will be subject to judicial review.

This Court has consistently refused judicial review of preliminary or procedural orders issued under the Interstate Commerce Act and like statutes. In *United States* v. *Illinois Central R. Co.,* 244 U. S. 82, the railroad sought to have set aside an order of the Commission setting for hearing complaints of certain coal mines seeking reparation for failure to furnish coal cars for loading. The railroad contended that the Commission had no jurisdiction to award damages in the cases presented. This Court held that there had been no "order" which is within the purview of the Urgent Deficiencies Act, and that the railroad's suit should therefore be dismissed. See also *John J. Casale, Inc.* v. *United States,* 52 F. Supp. 1005 (D. Del.), affirmed, 321 U. S. 752.

In *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, the Federal Power Commission had issued an order requiring certain public utilities to appear at a hearing and produce certain documents, and the utilities sought to have the Commission enjoined until it had passed upon their claims that they were not subject to the Federal Power Act and that the hearing was for a purpose not authorized by the Act. This Court, citing the *Illinois Central* case and numerous other decisions as to the reviewability of orders of the Interstate Commerce Commission, held that the statute authorized review only of "orders of a definitive character dealing with the merits of a proceeding" and did not embrace "mere preliminary or procedural orders". 304 U. S. at 384–385. The Court

also said (304 U. S. at 385): "So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration."

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,

JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission.

NOVEMBER 1958.

APPENDIX A

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of October, 1956.

No. MC–C–2039

TERRITO & SONS, A PARTNERSHIP—INVESTIGATION OF OPERATIONS

It appearing, That there is reason to believe that Territo & Sons, a partnership, composed of Salvatore Territo, Charles Territo, and Vincent Territo, with headquarters at 36–46 Straight Street, Paterson, New Jersey, has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or a permit issued by this Commission authorizing said Territo & Sons to engage in operations as a common or contract carrier; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby, instituted under Section 204 (c) of said Act, into and concerning the motor carrier operations of said Territo & Sons, with a view to determining whether it has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by mo-

tor vehicle, in violation of Section 206 (a) (1) or 209 (a) (1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That Territo & Sons, a partnership, Salvatore Territo. Charles Territo and Vincent Territo, all of 36–46 Straight Street, Paterson, New Jersey, be, and they are hereby, made respondents in this proceeding;

It is further ordered, That this matter be assigned for hearing at a time and place to be fixed and on a consolidated record with the proceeding in MC–C–2040, Calter Petroleum Co., Inc.—Investigation of Operations;

It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violation of said Sections 206 (a) (1) and 209 (a) (1) of said Act;

And it is further ordered, That a copy of this order be served upon said respondent and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

[SEAL] HAROLD D. McCOY,
Secretary.

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of October, 1956.

No. MC–C–2040

CALTER PETROLEUM CO., INC.—INVESTIGATION OF OPERATIONS

It appearing, That there is reason to believe that Calter Petroleum Co., Inc., with headquarters at 36–46 Straight Street, Paterson, New Jersey, has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or a permit issued by this Commission authorizing said Calter Petroleum Co., Inc. to engage in operations as a common or contract carrier; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby instituted under Section 204 (c) of said Act, into and concerning the motor carrier operations of said Calter Petroleum Co., Inc., with a view to determining whether it has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206

(a) (1) or 209 (a) (1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That Calter Petroleum Co., Inc., Charles Territo, Vincent Territo, Joseph Territo, and James Calderio, all of 36–46 Straight Street, Paterson, New Jersey, be, and they are hereby, made respondents in this proceeding;

It is further ordered, That this matter be assigned for hearing at a time and place to be fixed and on a consolidated record with the proceeding in MC–C–2039, Territo & Sons, a partnership,—Investigation of Operations;

It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violations of said Sections 206 (a) (1) and 209 (a) (1) of said Act;

And it is further ordered, That a copy of this order be served upon said respondent and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY,
Secretary.

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